No. 448

In the Supreme Court of the United States

OCTOBER TERM, 1944

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

HANCOCK TRUCK LINES, INC.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA

REPLY BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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We wish to comment briefly upon certain contentions in appellee's brief. We believe that these contentions are irrelevant.

1. In its "Corrected Statement of the Case" (Br. 2–11),[1] appellee recites at length the history

[1] Appellee states (Br. 2) that "such corrected statement" is "taken largely from the findings of fact, found in the Record between pages 65 and 73." The "findings of fact" there referred to are not findings of fact made by the Commission, but are those prepared by appellee and signed by the court below. Appellants assigned as error the making of those findings and the consideration thereof by the district court as a basis for its decree (Assignment of Errors Nos. 3 and 8, R. 75, 76).

and characteristics of appellee's motor-carrier operations other than those derived from its acquisition of its predecessor, Globe; the circumstances described by Division 4 of the Commission in its report made in connection with its order of May 16, 1942, approving the purchase of Globe by appellee (38 M. C. C. 382; R. 99, 104); and the steps taken by appellee to expand and alter, since its acquisition of Globe, the operations acquired from Globe. Appellee complains (Br. 8, 45) that if the Commission's order of August 4, 1943 (R. 49–50), is enforced, "all of the business which appellee has built up under said unification order of May 16, 1942, will be destroyed, and appellee will be put back to the position which Globe was in when said order was entered." We submit that the position which Globe was in during the "grandfather" period is precisely the position in which appellee should be placed. An applicant under the "grandfather" clause (sec. 206 (a)) is entitled only to authority to continue the operations which were conducted *bona fide* on and since June 1, 1935. That provision of the statute does not permit an applicant to improve his position in the transportation system by enlarging the scope of his business beyond that existing on the "grandfather" date.

Appellee is not entitled to any greater rights than Globe would have been entitled to if the sale to appellee had never taken place. The

order of Division 4 of the Commission on May 16, 1942, in the acquisition proceeding (38 M. C. C. 382, R. 99) merely authorized transfer to appellee Hancock of whatever rights Globe might ultimately be entitled to upon the outcome of the proceedings dealing with its "grandfather" clause application. The report of Division 4 in the acquisition proceeding expressly states (R. 104) that: "Hancock * * * will be entitled to a certificate covering any 'grandfather' common-carrier rights which may be confirmed as a result of those applications."[2] The order issued pursuant to that report specifically stated in its concluding paragraph (R. 105) "That nothing herein contained shall be construed as a determination of the operating rights of any person or persons under any section of the act, except section 5 thereof, as expressly determined herein." By virtue of this order appellee obtained only such rights as might ultimately be granted as a result of the "grandfather" clause proceedings.

Appellee purchased Globe with full knowledge that Globe's "grandfather" application was still pending and undetermined. Appellee, as successor in interest to Globe, took Globe's interest subject to the contingency of a possible unfavor-

[2] In accordance with the Commission's usual policy of preventing duplications, a further provision was added by Division 4 which had the effect of limiting its approval of the transfer of Globe's ultimate "grandfather" rights to those which would not duplicate other operating rights held by Hancock (R. 104).

able decision by the Commisison on the "grandfather" claim.[3] Appellee's claim is analogous to a statement by a purchaser of land subject to litigation, that he ought to be allowed to hold the land even after an adjudication that his grantor's title was defective.

Clearly no consideration can be given in this case to appellee's contentions regarding the business it has built up since its acquisition of Globe and regarding the volume of traffic obtained from shippers other than freight forwarders which appellee, since its purchase of these routes from Globe, has transported over some of these routes. Such subsequent operations by appellee could not increase Globe's rights under the "grandfather" clause, and it is only those rights that appellee may assert here as successor in interest to Globe. Only in a proceeding involving the issue of "public convenience and necessity" under Section 207 would the considerations which appellee seeks to urge become pertinent. Appellee is free to file an application under Section 207 if it wishes to obtain, upon grounds of public convenience and necessity, the right to transport traffic of a type which Globe did not handle during the "grandfather" period.

[3] For example, if Globe's application had been denied because of interruption of service (cf. *Gregg Cartage Co. v. United States*, 316 U. S. 74), it cannot be supposed that appellee would, nevertheless, be entitled to a certificate.

The order of Division 4 (38 M. C. C. 382; R. 99, 104) is of no pertinence in this case, except as showing appellee's standing to sue as successor in interest to Globe. That order was made in proceedings under Section 5 of the Interstate Commerce Act, which requires approval by the Commission for transactions where one carrier obtains control of another.[4] We do not question appellee's right to whatever operating authority Globe might ultimately obtain in the "grandfather" clause proceeding. The question in the case at bar is as to the proper scope of such authority.

2. In determining what authority appellee is entitled to under the "grandfather" clause the Commission did not in any manner affect the order made by Division 4 on May 16, 1942, authorizing appellee to become successor in interest to Globe (38 M. C. C. 382; R. 99, 104). It is incorrect to assert, as appellee does (Br. 37), that by the

[4] An order under Section 5 is purely permissive. Appellee was not obliged by the order of Division 4 to consummate the transaction for which approval was given therein, or compelled by virtue of that order to pay the purchase price of $9,900 to Globe, as argued in appellee's brief (Br. 36). Moreover, it should be noted that the proceedings before Division 4 were practically *ex parte*. No protestants appeared (R. 99). The recitals made by Division 4, which appellee sets forth at length (Br. 29–34), were thus based entirely upon the evidence submitted by the vendor and vendee themselves, both of which were controlled by a single family (R. 100).

Commission's order involved in the case at bar the order of Division 4 made on May 16, 1942. is "set aside, or its virility nullified." In fact, appellee elsewhere seems to recognize that "a hearing and decision under Section 5 can not be confounded and intermingled with a hearing on an application under Section 206" (Br. 36).

Appellee was deprived of nothing given by the order of Division 4 of May 16, 1942, even if the unsound assumption be indulged *arguendo* that the purchase proceedings order of Division 4 (38 M. C. C. 382; R. 99) "is a vested property right of appellee" which "confers contractual rights" such as those derived from a policy of war risk insurance (Br. 40). No question of constitutional right under the Fifth Amendment is involved.[5] Other than the jurisdictional question, the only question is the lawfulness of the Commission's exercise of its powers under the Interstate Commerce Act. Obviously if the order complained of is a valid exercise of regulatory power under the Interstate Commerce Act, appellee is subjected to no deprivation of property without the due process of law. *Baltimore & Ohio Railroad Co.* v. *United States,* 305 U. S. 507, 526; *Visceglia* v. *United States,* 24 F. Supp. 355, 339 (S. D. N. Y.); *Transamerican Freight Lines*

[5] Compare the clearly erroneous conclusions contained in the district court's findings of fact Nos. 2 and 19 (R. 66, 73); see Assignment of Errors Nos. 3, 9, and 17 (R. 75–77).

v. *United States*, 51 F. Supp. 405, 410 (D. Del.); cf. Section 207 (b) of the Interstate Commerce Act (49 U. S. C. 307 (b)).

3. It is difficult to comprehend the pertinence of appellee's reference (Br. 15, 43) to Sections 216 (a) and 216 (d) of the Interstate Commerce Act (49 U. S. C. 316 (a) and 316 (d)).

The first of these provisions relates solely to passenger carriers, and makes it their duty to provide safe and adequate service, and to establish reasonable fares and practices relating to the issuance of tickets and the carrying of baggage. This provision of the statute is not applicable to appellee at all, since appellee is solely a carrier of property. Section 216 (b) contains similar provisions applicable to carriers of property, but no issue as to any matter covered by this provision is involved in the instant case.

Likewise, no issue arises here under Section 216 (d), which prohibits unreasonable and discriminatory rates. The fact that appellee in its motor-carrier operations has complied with applicable regulations as to safety, equipment, packing, and marking property, and filing tariffs is not a circumstance bearing upon the scope of its rights under the "grandfather" clause. These matters might instead be evidence as to the "fitness" of the carrier in a non-"grandfather" proceeding under Section 207 of the Act.

The mere fact that appellee is a common carrier and as such under a duty to serve the public does not authorize it to furnish service in excess of its operating authority as granted by the Commission pursuant to the regulatory statute. As a daily routine the Commission conducts investigations with a view to prosecuting common carriers which contravene the territorial and commodity limitations of their certificates. It has never been supposed that merely because a carrier is a common carrier it is entitled to serve all localities or to transport all commodities without regard to the scope of its operating authority.

4. Appellee asserts that its abandonment of the issue as to commodity restrictions in its petition for reconsideration before the Commission was not a voluntary waiver (Br. 50–54; cf. R. 129–130). It seems to view its action before the Commission in renouncing its claim in that respect as merely a proposition offered in a bargaining process. It seems unnecessary to state that a proceeding before the Commission is not a negotiation leading to a contract with the applicant, but is a quasi-judicial exercise of public authority. Having complete freedom to decide what position it should take in its capacity as a party to such a proceeding, appellee cannot be heard to say that its decision as to the most appropriate and advisable method of presenting its case is not its own voluntary act.

CONCLUSION

For the foregoing reasons, appellants submit that the matters contained in appellee's brief which are discussed herein are not material to the issues involved in this case and may be dismissed from consideration.

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